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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:)	1998 OAL Determination No. 3
)	
Request for Regulatory)	[Docket No. 90-048]
Determination filed by)	
CHARLES ANTHONY TOOMA)	May 8, 1998
regarding DEPARTMENT OF)	
CORRECTIONS' Operations)	Determination Pursuant to
Manual section 54020.4--)	Government Code Section
"Responsibility and Conduct)	11340.5; Title 1, California
of Visitors" ¹)	Code of Regulations,
)	Chapter 1, Article 3
)	

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether a policy limiting physical contact between prisoners and visitors is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the policy is a "regulation." After this request for determination was filed, however, the Department formally adopted the policy in compliance with APA requirements. The policy is now published in the California Code of Regulations, Title 15, section 3170(g).

ISSUE

OAL has been requested to determine whether a policy limiting physical contact between inmates and visitors (Department of Corrections' Operations Manual section 54020.4) is a "regulation" required to be adopted pursuant to the APA.² Charles Anthony Tooma filed this request as an inmate at the California Department of Corrections' Sierra Conservation Center. The Department concedes that this policy should have been adopted pursuant to the APA.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a) declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]* [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.³ After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking (subdivisions (c) and (d)). None apply here.

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement or revision of any such rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁴ the California Court of Appeal upheld OAL's two-part test⁵ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"⁶

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

Section 54020.4 of the Operations Manual ("Responsibility and Conduct of Visitors") states in part that:

"Each inmate and visitor is responsible for their conduct during visits.
....

"An inmate and their visitor may embrace, including a kiss, at the beginning and end of each visit. No other personal body contact is permitted."

"Visitors, with the exception of children under ten years of age, shall not sit on an inmate's lap."
....

As a part of the Department Operations Manual, which "contains policy and procedures for *uniform* operation of the Department," (Section 12010.6, emphasis added) these visitor conduct requirements appear to be standards of general application.

In addition to a copy of the manual provision, the requester submitted a memo dated September 21, 1990, from E. Chittock, Visiting Sergeant, concerning the rule's enforcement at Sierra Conservation Center. The memo states that:

"[These] guidelines are a brief embrace and kiss at the beginning of an Inmate[']s visit and again at the conclusion of the visit. *These guidelines are a standard throughout the Department of Corrections*" [Emphasis added.]

We conclude that the challenged rule was a standard of general application, a rule that applied statewide to all inmates and to all visitors.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 5058, subdivision (a) declares that

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons"

Penal Code section 5054 declares that

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

Until 1994⁷, Penal Code section 2601, subdivision (d) stated that prisoners had the right

"To . . . personal visits; provided that the department may provide such restrictions as are necessary for the reasonable security of the institution."

Setting the limits of physical contact during visitation implements, interprets and makes specific the Department's authority to supervise, manage and control the state's prisons. The limits also implement, interpret, and make specific the Department's authority to restrict visitation for security reasons.

We conclude that the challenged policy is a "regulation" within the meaning of Government Code section 11342.

III. DOES THE CHALLENGED RULE FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.⁸ Rules concerning

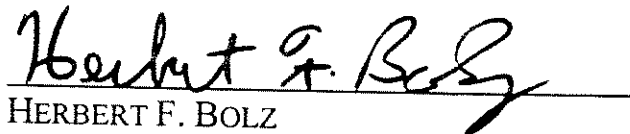
certain specified activities of state agencies are not subject to the procedural requirements of the APA.⁹

We conclude that none of these general exemptions apply here.

CONCLUSION

For the reasons set forth above, OAL finds that the policy limiting physical contact between prisoners and visitors is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

DATE: May 8, 1998



HERBERT F. BOLZ

Supervising Attorney

Regulatory Determinations Program

Office of Administrative Law

555 Capitol Mall, Suite 1290

Sacramento, California 95814

(916) 323-6225, CALNET 8-473-6225

Telecopier No. (916) 323-6826

Electronic mail: hbolz@oal.ca.gov

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ENDNOTES

1. This Request for Determination was filed by Charles Anthony Tooma, who, at the time of filing, was incarcerated at the Sierra Conservation Center. The Department of Corrections was represented by Peggy McHenry of the Regulations and Policy Management Branch, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 327-4270.

2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) ___ Cal.App.4th ___, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) ___ Cal.App.4th ___, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American*

Physicians & Dentists v. Kizer (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

6. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
7. Penal Code section 2601(d) was amended by Stats. of 1994, c. 555 (SB 1260), and again amended in 1996.
8. Government Code section 11346.
9. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of *counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365,

376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)